No. 211

Supreme Court of the United States

OCTOBER TERM, 1957

[illegible] MANUFACTURING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

[illegible] FOR A WRIT OF CERTIORARI TO THE UNITED [illegible] COURT OF APPEALS FOR THE SIXTH CIRCUIT

FOR THE NATIONAL LABOR RELATIONS BOARD
IN OPPOSITION

J. LEE RANKIN,
Solicitor General
Department of Justice, Washington 25, D. C.

D. FENTON,
Assistant General Counsel

N LEONARD,
Associate General Counsel

R L. MANOLI,
Attorney
National Labor Relations Board
Washington 25, D. C.

INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute and rule involved	2
Statement	4
Argument	10
Conclusion	13

CITATIONS

Cases:

Amalgamated Meat Cutters, etc. v. *National Labor Relations Board*, 352 U. S. 153 — 6

Goodman Manufacturing Company v. *National Labor Relations Board*, 234 F. 2d 775, certiorari denied, 352 U. S. 872 — 11

Lennox Manufacturing Company, 103 N. L. R. B. 887 — 5

National Labor Relations Board v. *Coca-Cola Bottling Co.*, 350 U. S. 264 — 10–11

National Labor Relations Board v. *Lennox Manufacturing Company*, 226 F. 2d 194 — 6

United Tanners, Inc., 103 N. L. R. B. 760 — 12

Statutes:

National Labor Relations Act, as amended, 61 Stat. 136, 65 Stat. 601, 29 U. S. C. 151, *et seq.*:

Section 8 (a) (1) — 5

Section 8 (a) (3) — 5

Section 9 (b) — 2

National Labor Relations Board Rules and Regulations, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. (1955 Supp.):

Section 102.13 — 3

Section 102.13 (b) — 3

Section 102.13 (b) (1) — 3

Section 102.13 (b) (2) — 4

Section 102.13 (b) (3) — 4

In the Supreme Court of the United States

OCTOBER TERM, 1957

No. 211

LANNOM MANUFACTURING CO., INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (Pet. App. 19–24) is reported at 243 F. 2d 304. The findings of fact, conclusions of law, and order of the National Labor Relations Board are reported at 103 N. L. R. B. 847.

JURISDICTION

The judgment of the court below was entered on April 8, 1957. The petition for certiorari was filed on June 21, 1957. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1). See also Section 10 (e) of the National Labor Relations Act, as amended, 29 U. S. C. 160 (e).

QUESTIONS PRESENTED

1. Whether the court below properly held that the members of the Executive Board and the Directing Committee of the Executive Board of a labor organization, none of whom are designated or described as officers in the union's constitution, are not subject to the non-Communist affidavit filing requirements of Section 9 (h) of the National Labor Relations Act.

2. Whether the court below properly denied petitioner's motion to remand the case to the Board for the purpose of determining whether a union agent's failure to execute a non-Communist affidavit constituted circumvention and evasion of the filing requirements of Section 9 (h).

STATUTE AND RULE INVOLVED

1. Section 9 (h) of the National Labor Relations Act, as amended, 61 Stat. 136, 146; 65 Stat. 601, 602, 29 U. S. C. 159 (h), provides:

> REPRESENTATIVES AND ELECTIONS
>
> SEC. 9. * * *
>
> (h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of

which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods." The provisions of section 35A of the Criminal Code shall be applicable in respect to such affidavits.

2. Section 102.13 (b) of the Rules and Regulations of the National Labor Relations Board, Series 6, 16 F. R. 1934, 1938, 29 C. F. R. (1955 Supp.) 102.13 (b) provides:

> § 102.13 *Compliance with section 9 (f), (g), and (h) of the act.* * * *
>
> (b) For the purpose of the rules and regulations in this part, compliance with section 9 (h) of the act means in the case of a national or international labor organization, that it has filed with the general counsel in Washington, D. C., and in the case of a local labor organization, that any national or international labor organization of which it is an affiliate or constituent body has filed with the general counsel in Washington, D. C., and that the labor organization has filed with the regional director in the region in which the proceeding is pending:
>
> (1) A declaration by an authorized representative of the labor organization, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, listing the titles of all offices of the filing organization and stating the name of the incum-

bent, if any, in each such office and the date of expiration of each incumbent's term.

(2) An affidavit by each officer referred to in subparagraph (1) of this paragraph, executed contemporaneously with the charge (or petition) or within the preceding 12-month period, stating that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods.

(3) The term "officer" as used in subparagraph (2) of this paragraph shall mean any person occupying a position identified as an office in the constitution of the labor organization; except, however, that when the Board has reasonable cause to believe that a labor organization has omitted from its constitution the designation of any position as an office for the purpose of evading or circumventing the filing requirements of section 9 (h) of the act, the Board may, upon appropriate notice, conduct an investigation to determine the facts in that regard, and where the facts appear to warrant such action the Board may require affidavits from persons other than incumbents of positions identified by the constitution as offices before the labor organization will be recognized as having complied with section 9 (h) of the act.

STATEMENT

The instant case arises out of an unfair labor practice proceeding conducted before the National Labor

Relations Board pursuant to Section 10 of the National Labor Relations Act. Upon charges filed by the International Fur and Leather Workers Union (hereinafter called the Union),[1] the Board's General Counsel issued a complaint alleging that petitioner violated Section 8 (a) (1) and (3) of the Act. *Lamson Manufacturing Company*, 103 N. L. R. B. 847. At the hearing on the complaint, petitioner moved to dismiss the complaint on the ground that the Union was not in compliance with the non-Communist affidavit requirements of Section 9 (h) of the Act. Petitioner offered to prove that the affidavit filed by Ben Gold, the Union's president, was false, and that Irving Potash had resigned his position as vice president of the Union in order to avoid signing a non-Communist affidavit but nevertheless continued to perform the same duties (103 N. L. R. B. at 852). The Trial Examiner rejected petitioner's offer of proof and denied the motion on the ground that these matters are not litigable in the unfair labor practice proceeding (*Ibid.*). In its decision and order issued March 20 1953, the Board affirmed this ruling and also stated that it is "administratively satisfied that the Union was in compliance with Section 9 (h) at all times relevant hereto" (103 N. L. R. B. at 847, n. 2). On the merits, the Board found that petitioner violated Section 8 (a) (1) and (3) of the Act. 103 N. L. R. B. 847.

In September 1954, the Board petitioned for enforcement of its order in the court below. Petitioner

[1] In February 1955, the Union merged with the Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO.

moved to dismiss the petition on the ground that Ben Gold, the Union president, had recently been convicted for filing a false non-Communist affidavit, and, therefore, the Union was not in compliance with Section 9 (h) of the Act. The court below granted petitioner's motion. *National Labor Relations Board* v. *Lannom Manufacturing Company*, 226 F. 2d 194. Thereafter, this Court granted the Union's petition for certiorari to review the decision of the court below. On December 10, 1956, this Court, concluding that "the sole sanction for the filing of a false affidavit under Section 9 (h) is the criminal penalty imposed on the officer who files a false affidavit, not decompliance of the union nor the withholding of the benefits of the Act," reversed the action of the court below in dismissing the enforcement petition. *Amalgamated Meat Cutters, etc.* v. *National Labor Relations Board*, 352 U. S. 153.

On the return of the case to the court below, petitioner filed a motion to remand the proceeding to the Board for the purpose of introducing the evidence, previously rejected by the Trial Examiner at the unfair labor practice hearing (*supra*, p. 54), relating to Irving Potash (Pet. App. 24–26). Petitioner, thereafter, also filed a supplemental motion to remand the case to the Board for the purpose of receiving additional evidence purporting to show that the members of the Union's Executive Board, its Directing Committee, and Potash, who allegedly was occupying the position of President of the Fur Division of the

Union,[2] were officers of the Union within the meaning of Section 9 (h), and that their failure to file the non-Communist affidavits invalidated the proceeding (Pet. App. 26–27). In support of its motion, petitioner annexed a copy of the Union's 1950 constitution, relying particularly on Articles V and VI thereof.

Section 1 of Article VI of the Union's constitution entitled, "International Officers" provides as follows:

> SECTION 1. The officers of the International Union shall be the International President, the International Secretary-Treasurer, and the President and Secretary-Treasurer of each Division, and no others. The International Union officers shall be elected by majority vote of the International Convention. The officers of a division may simultaneously be officers of the International provided that no officer shall draw salary from more than one office at the same time.

The balance of Article VI describes the duties of each officer, prescribes their eligibility for office, and sets forth the terms of office. Article V of the constitution, entitled "International Executive Board," describes the composition of the Executive Board and its Directing Committee, their powers and duties, method of election, etc. Article V specifically makes the International officers enumerated in Article VI members of the Executive Board "by virtue of their office" and speaks of the remaining members of the

---

[2] While petitioner in its original motion to remand, as well as at the hearing before the Board, contended that Potash was a concealed Vice President, it now contends in its supplemental motion that he was a concealed Division President.

Executive Board as "non-officer" members. Among the duties of the Executive Board are the duties to enforce the Union's constitution, to carry out the instructions of the International Convention, to direct the affairs of the Union between International conventions, to control the Union's property, and to arrange for the auditing of the books of locals. Section 12 of Article V provides that the Executive Board may appoint a subcommittee to be known as the Directing Committee which may in some cases act for the full Board.

Opposing petitioner's motion in the court below, the Board conceded that the members of the International Executive Board and its Directing Committee did not file any non-Communist affidavits except insofar as any one of them was also an International officer as described in Article VI of the Union's constitution (Pet. App. 29). The Board also named the individuals who had filed non-Communist affidavits for each office listed in Article VI; Irving Potash was not one of them (ibid.).[1] Petitioner thereupon filed an "Alternate Motion to Dismiss" the Board's petition for enforcement on the ground that "the record before [the court below], including the admissions contained in the Board's Memorandum in opposition to [petitioner's] Supplemental Motion to Remand, shows, without dispute, that a large number of persons occupying positions identified as offices

[1] Ben Gold, International President, was also listed as occupying the office of Division President of the Fur Division (Pet. App. 29).

failed to file the affidavits required by Section 9 (h) of the Act" (Pet. App. 32).

The court below denied petitioner's motion to remand the case to the Board and its alternate motion to dismiss the petition for enforcement (Pet. App. 19–24). The court stated (Pet. App. 22–23):

> On the undisputed facts before us Potash was not one of those designated as officers by the Constitution. Nor, did the Constitution at any place state that the members of the International Executive Board and its Directing Committee were officers of the Union. Article VI, by the use of the words "and no others" expressly excludes them from its "officers." The question presented is whether those facts are controlling in the matter, or can we look into the scope of activities of these various persons and the powers and duties conferred upon them by the Constitution and conclude that they are in fact "officers" of the Union by the application of the functional test, although they are not "officers" in the constitutional sense. This question was considered by the Supreme Court in *N. L. R. B.* v. *Coca-Cola Bottling Co., supra*, 350 U. S. 264, 268–269, in which it ruled that the word "officers" in the statute is a word of familiar usage and is to be construed in accordance with the meaning given to it by the ordinary man. It said: "'Officers' normally means those who hold defined offices. It does not mean the boys in the back room or other agencies of invisible government, whether in politics or in the trade-union movement." It pointed out that the statute

differentiates between "officers" and "agents" of labor organizations.

* * * * *

In the present case, Article VI dealing with International Officers is not ambiguous. It specifically describes them and further states "and no others." Applying the constitutional test, which was approved in *N. L. R. B. v. Coca-Cola Bottling Co.*, *supra*, instead of the functional test urged upon us by respondent, the members of the International Executive Board, its Directing Committee, and Potash were not "officers" of the Union within the meaning of Section 9 (h) of the Act.

ARGUMENT

1. The holding of the court below that the members of the Union's Executive Board, its Directing Committee, and Potash were not officers subject to the filing requirements of Section 9 (h) of the Act is correct and presents no issue warranting further review by the Court. Petitioner's contention that these individuals, although not occupying positions identified as "offices" in the union's constitution, are nevertheless required to file non-Communist affidavits because they are "members of the governing board of a Labor Union who are vested with full and complete management and control under the Union Constitution" (Pet. 22, 6, 9–15) amounts to substituting for the "constitutional test" of an officer the "functional test" which this Court rejected in *National Labor Relations Board v. Coca-Cola Bottling Co.*, 350 U. S. 264. In the *Coca-Cola* case, this Court approved the

Board's construction of the term officer as used in Section 9 (h) to mean "any person occupying a position identified as an office in the constitution of the labor organization," as distinguished from other members of the union, who, though "effective instruments of its policies," do not "fill the offices designated by their organization's constitution" (350 U. S. at 268).

Goodman Manufacturing Company v. *National Labor Relations Board*, 234 F. 2d 775 (C. A. 7), certiorari denied, 352 U. S. 872, relied on by petitioner, is not, as the court below pointed out (Pet. 23), in conflict with the decision below. In that case, the court found that the union's constitution was ambiguous in its designation of officers, for the "trustees" and "secretaries" in question were lumped in the same section of the constitution with other admitted officers of the union. The court, therefore, found it "proper to resort to other provisions of the constitution" dealing with the functions and duties of the trustees and secretaries in order to determine whether these positions were "identified as an office" in the union's constitution, 234 F. 2d at 778. Here, on the other hand, the constitution leaves no room for doubt as to the exclusion of members of the Executive Board and its Directing Committee from the category of officers, for Article VI of the Union's constitution, after describing the "officers" of the Union, expressly adds "and no others" (*supra*, p. 7).

2. The Board properly rejected petitioner's offer of proof that Irving Potash had resigned his title as vice president of the Union in order to avoid signing a

non-Communist affidavit but nevertheless continued to perform the same duties. The offer, even if proved, is immaterial as the position of vice president is not listed as an office in the Union's constitution. Moreover, the claim of circumvention is patently without merit since the position of vice president was abolished by the union in 1943, long before the enactment of Section 9(h). *United Tanners, Inc.*, 103 N.L.R.B. 760, 761, n. 3.

Petitioner's further contention that the court below erred in denying petitioner's motion to remand the case for the purpose of showing that Potash was a "concealed" officer, in that he was in fact exercising the powers of president of the Fur Division of the Union[4] though he did not possess the title, presents no question warranting further review by this Court. The motion in this respect went beyond the original offer of proof before the Board which merely alleged that Potash was a "concealed" vice president of the Union (*supra*, p. 5); it appears to have been merely an afterthought on the part of petitioner when the Board, in its response to petitioner's original motion to remand the case, pointed out that the position of vice president had been eliminated from the

---

[4] As noted above, p. 8, n. 3, the Board's records showed that Ben Gold was listed as the occupant of this office.

Union's constitution in 1943.[5] In the circumstances, petitioner's claim of error is insubstantial.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

J. LEE RANKIN,
Solicitor General.

JEROME D. FENTON,
General Counsel,
STEPHEN LEONARD,
Associate General Counsel,
DOMINICK L. MANOLI,
Assistant General Counsel,
National Labor Relations Board.

JULY 1957.

---

[5] In relevant part, the Board's memorandum in opposition (which the petition does not include in its appendix) stated:

"4. For the following reasons, we submit that the issue raised by respondent does not warrant a remand to the Board:

* * * * * * *

"(c) Since the office of international vice president is not listed in the Union constitution, Potash, even if he were exercising the duties of vice-president, as respondent alleged, would thus not be required to file Section 9 (h) affidavits, unless his office had been eliminated from the constitution for purposes of evasion. The Board has already considered this issue in *United Timmers*, *supra*, holding that, as the position of international vice president had been eliminated from the Union constitution in 1943, the change could hardly have been made in order to circumvent the filing requirements. Accordingly, insofar as respondent raises an evasion problem, it does not appear to be substantial."